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**Datasheet for the decision  
of 16 April 2021**

**Case Number:** T 2257/18 - 3.5.07

**Application Number:** 05788823.2

**Publication Number:** 1810167

**IPC:** G06F17/30, G06F15/16

**Language of the proceedings:** EN

**Title of invention:**

System and method for optimizing website visitor actions

**Applicant:**

Sitespect, Inc.

**Headword:**

Optimizing website visitor actions/SITESPECT

**Relevant legal provisions:**

EPC Art. 84

RPBA 2020 Art. 13(2)

**Keyword:**

Claims - clarity - main request and first to seventh auxiliary requests (no)

Amendment after summons - exceptional circumstances - eighth auxiliary request (no)

**Decisions cited:**

G 0001/04



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Case Number: T 2257/18 - 3.5.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.07**  
**of 16 April 2021**

**Appellant:** SITESPECT, INC.  
(Applicant) 263 Beacon Street, 5th floor  
Boston MA 02116 (US)

**Representative:** Phillips & Leigh LLP  
Temple Chambers  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 20 April 2018  
refusing European patent application No.  
05788823.2 pursuant to Article 97(2) EPC**

**Composition of the Board:**

**Chair** M. Jaedicke  
**Members:** C. Barel-Faucheux  
E. Mille

## **Summary of Facts and Submissions**

- I. The applicant (appellant) appealed against the examining division's decision refusing European patent application No. 05788823.2, filed as international application PCT/US2005/030205 (published as WO 2006/031402).
- II. The documents cited in the contested decision included:  
D1: WO 01/77909 A2, published on 18 October 2001
- III. The examining division refused the application on the grounds that the subject-matter of independent claims 1 and 18 of the then main request and the then first and second auxiliary requests lacked inventive step over the prior art disclosed in document D1, and because independent claims 1 and 18 of the then main request did not meet the requirements of Article 84 EPC.
- IV. In its statement of grounds of appeal, the appellant requested that the decision be set aside and that a patent be granted on the basis of a main request, considered as the first auxiliary request in the contested decision and resubmitted as the main request with the statement of grounds of appeal, or any of seven auxiliary requests. All auxiliary requests were submitted with the grounds of appeal.

Furthermore, the appellant referred to the following newly cited documents:

- D5: RFC 3040 "Internet Web Replication and Caching Taxonomy", retrieved from <https://tools.ietf.org/html/rfc3040>

D6: "Reverse Proxy", webpage <https://www.incapsula.com/cdn-guide/glossary/reverse-proxy.html>

D7: The declaration of Theodore C. Loder IV, submitted along with the grounds of appeal

- V. In a communication under Article 15(1) RPBA 2020 accompanying the summons to oral proceedings, the board raised clarity issues against the main request and the seven auxiliary requests and expressed its provisional opinion that the subject-matter of claim 1 of the main request and of each of the first to seventh auxiliary requests lacked inventive step in view of document D1.
- VI. By letter of 9 March 2021, the appellant submitted further arguments.
- VII. In the course of oral proceedings, held as scheduled by videoconference, the appellant filed an eighth auxiliary request. At the end of the oral proceedings, the chairman announced the board's decision.
- VIII. The appellant's final requests were that the decision under appeal be set aside and a patent be granted on the basis of the main request or, alternatively, on the basis of one of auxiliary requests 1 to 7, all filed with the statement setting out the grounds of appeal, or the eighth auxiliary request submitted by the appellant during the oral proceedings before the board.
- IX. Claim 1 of the main request reads as follows (itemisation by the board):  
"[A] A method of testing variations in a target server's website content and measuring the impact that those content variations have on visitor

conversion actions,  
characterised in the method comprising:

- [B] receiving a request at a reverse proxy server (120) from an electronic device (100,300) operated by a visitor for web content from a target server (130);
- [C] said reverse proxy server (120) requesting and retrieving web content from said target server (130);
- [D] modifying said web content for testing;
- [E] said reverse proxy server (120) sending modified web content to said electronic device (100,300);
- [F] and tracking actions, including responses, non-responses, conversions, non-conversions, of said visitor."

X. Claim 1 of the first auxiliary request differs from claim 1 of the main request in that "across repeated visits" is added at the end of the claim.

XI. Claim 1 of the second auxiliary request differs from claim 1 of the main request in that the following text (hereinafter: "text T") is added at the end of the claim:

"wherein the method further comprises:  
assigning said visitor to a test group;  
tracking actions of said visitor in comparison to said test group;  
and tracking visitor session data using said proxy server (120)."

XII. Claim 1 according to the third auxiliary request differs from claim 1 of the main request in that its step F reads as follows:

"and tracking conversion actions of said visitor".

- XIII. Claim 1 according to the fourth and fifth auxiliary requests differs from claim 1 according to the first auxiliary request and third auxiliary request, respectively, in that text T is added at the end of the claim.
- XIV. Claim 1 according to the sixth auxiliary request differs from the third auxiliary request in that "across repeated visits" is added at the end of the claim.
- XV. Claim 1 according to the seventh auxiliary request differs from the sixth auxiliary request in that text T is added at the end of the claim.
- XVI. Claim 1 according to the eighth auxiliary request differs from the main request in that it amends feature A as follows:  
"A method of testing variations in a target server's website content and tracking visitor actions, characterised in the method comprising:"
- XVII. The appellant's arguments, where relevant to the decision, are discussed in detail below.

## **Reasons for the Decision**

### **The invention**

1. The application relates to conversion marketing, namely the science of measuring, testing and improving the rate at which website visitors respond to website content with a predefined action or actions, including, but not limited to, clicking a link, filling out a web page form, putting an item in a shopping basket, subscribing to a newsletter or purchasing a product

(description of the international application as published, paragraph [0003]).

The invention is a web software product that helps website operators create content variations and then scientifically test and measure the impact that those content variations have on visitor conversion actions. Website operators learn, for example, which product descriptions yield the most sales, which promotional language pulls the most sales leads and which site registration form generates the most sign-ups (paragraph [0022]). The target-server website operator creates test campaigns to measure the impact of variations of copy, headlines, positioning, layout, imagery, price, etc. (paragraph [0025]). Testing methods include well-known methods such as A/B testing (paragraph [0026]).

The invention provides a method for using a reverse proxy server to introduce page variations on existing website content, without the need to make any modification to existing (back-end) content on the target server. The target server hosts the website to be tested and evaluated. The reverse proxy server delivers web content variations to visitors (paragraph [0023]).

A visitor's web browser first sends a request directly to a reverse proxy server. The reverse proxy server then retrieves content from the target server. The target server sends unmodified content to the reverse proxy server. A modification module system on the reverse proxy server is then responsible for modifying and delivering content and tracking a visitor's actions (including responses, non-responses, conversions, non-conversions; paragraph [0023]).



**Main request**

2. *Clarity*

2.1 In point 8.1.2 of its communication, the board raised the following objection under Article 84 EPC with respect to claim 1 of the main request for the first time:

"Claim 1 of the main request defines '[a] method of testing variations in a target server's website content and measuring the impact that those content variations have on visitor conversion actions, [...] comprising [...] modifying said web content for testing [...] and tracking actions [...] of said visitor'. It may need to be discussed whether it is clear how the impact is measured. The step of 'measuring the impact' appears to be not apparent from the step of 'tracking actions'."

2.2 In its reply the appellant argued that claim 1 specifically referred to "tracking actions, including responses, non-responses, conversions, non-conversions, of said visitor". Moreover, the claim did not merely refer to "measuring the impact", but to "measuring the impact that those content variations have on visitor conversion actions". It was self-evident to the skilled person that since the method tracked conversions, the impact could be inferred from an increase or decrease in the conversion rate in particular website variations. As explained in paragraphs [0026] and [0027] of the description of the international application as published, tracking visitors' actions was how data for assessing the impact of such variations were acquired. Claim 1 specified that the method entailed measuring the impact that content

variations had on visitor conversion actions, and that conversions were tracked. The relevance of these two features to one another was self-evident.

2.2.1 In the oral proceedings, the appellant also stated that in paragraphs [0004] to [0021] the description of the international application discussed the prior art in the field of the application, arguing that it was evident to the skilled person that tracking visitors' actions was an intrinsic feature of the method and that the skilled person understood immediately how tracked actions could be used for measuring. The skilled person understood known testing methods such as A/B testing or multivariate testing. Claim 1 provided one of the data points needed for the measuring and it was evident how the further data points needed could be obtained.

2.3 The board agrees with the appellant that the skilled person would understand that the tracked actions could serve as input for measuring the impact that content variations have on visitor conversion actions. However, the wording of claim 1 alone does not explain to the skilled person how the measuring itself is done.

While claim 1 specifies that visitors' actions are tracked, it does not specify that, or how, these tracked actions are used for "measuring the impact that those content variations have on visitor conversion actions". Hence, it is not clear to the skilled person which features are implied by "measuring the impact that content variations have on visitor conversion actions" and thus how this feature limits the method specified by claim 1.

2.4 The board also agrees with the appellant that the cited paragraphs [0026] and [0027] further explain how data

on visitor actions are obtained for measuring and that measurement results are reported as statistical summaries, for example. The board notes that some of the test methods discussed in paragraph [0027] of the description even imply activities such as measuring visitor actions on the target server, whereas the steps according to features B to F of claim 1 are evidently concerned with the reverse proxy server. Consequently, the appellant's reference to the description does not overcome the board's objection under Article 84 EPC.

In any case, the meaning of the features of claim 1 should be clear for the person skilled in the art from the wording of the claim alone (see G 1/04, Reasons 6.2). As discussed above, this is not the case here.

As to the appellant's argument that the skilled person knew how to interpret the method of claim 1 regarding "measuring the impact" thanks to their knowledge of well-known testing methods, the board considers that the vague wording of claim 1 leaves the skilled person reading it in doubt as to the exact scope of protection of this claim, which is consequently unclear (see Case Law of the Boards of Appeal of the EPO, 9th edition 2019, II.A.3.1, first paragraph). In the context of claim 1 under discussion, interpretation by the skilled person alone cannot objectively establish which technical features "measuring the impact" implies besides tracking visitors' actions.

2.5 Consequently, the subject-matter for which protection is sought is not clearly defined by the wording of claim 1 (Article 84 EPC).

### **First to third auxiliary requests**

3. Claim 1 of the first and second auxiliary requests differs from claim 1 of the main request, respectively, on account of the following additional features:
  - F1 across repeated visits (in combination with feature F; first auxiliary request)
  - G assigning said visitor to a test group; tracking actions of said visitor in comparison to said test group; and tracking visitor session data using said proxy server (120) (second auxiliary request)
  
4. Claim 1 according to the third auxiliary request differs from claim 1 of the main request in that it replaces feature F as follows:
  - H tracking conversion actions of said visitor
  
5. *Clarity*
  - 5.1 First auxiliary request
    - 5.1.1 Feature F1 specifies that user actions are tracked according to feature F across repeated visits.
    - 5.1.2 The appellant argued that feature F1 provided further clarification, based on paragraph [0027] of the description, of how the impact of the modifications was tracked, since changes in visitor interactions over repeated visits would help to identify the impact of variations. It was clear that the measuring was done by tracking actions.
    - 5.1.3 Feature F1 does give more detail on how actions are tracked but fails to clarify what "measuring the impact" implies. Consequently, claim 1 according to the

first auxiliary request does not overcome the board's above-mentioned clarity objection against the main request (Article 84 EPC).

## 5.2 Second auxiliary request

5.2.1 According to the appellant, feature G added that a visitor is assigned to a test group and could be tracked in comparison with the test group. For this purpose, the proxy server tracked visitor session data. This explicit comparison of visitors using test groups clarified how the impact of content variations on visitor actions was measured. In view of these clarifications claim 1 according to the second auxiliary request was clear.

5.2.2 In the board's view, feature G gives more detail on how visitor actions are tracked but not on how the impact of the content variations is measured. Consequently, claim 1 according to the second auxiliary request does not resolve the board's above-mentioned clarity objection regarding the main request and is unclear (Article 84 EPC).

## 5.3 Third auxiliary request

5.3.1 Feature H of claim 1 according to the third auxiliary request amends feature F of claim 1 of the main request to "tracking conversion actions of said visitor". The appellant argued that it was routine for the skilled person to use the measurement for one visitor's conversions to measure the impact of content variations on visitor conversion actions.

5.3.2 For the board, feature H does not specify how the impact of content conversions is measured.

Consequently, the amendment made cannot overcome the board's clarity objection regarding claim 1 according to the main request. Hence, claim 1 according to the third auxiliary request is unclear (Article 84 EPC).

#### **Fourth to seventh auxiliary requests**

6. The fourth auxiliary request is directed to the combination of the amendments in the first and second auxiliary requests. The fifth auxiliary request combines the amendments in the second and third auxiliary requests, and the sixth auxiliary request combines the amendments in the first and third auxiliary requests. The seventh auxiliary request combines the amendments in the first to third auxiliary requests.

7. *Clarity*

7.1 According to the appellant, the fourth to seventh auxiliary requests combined the clarifications offered by two or more of the first to third auxiliary requests depending on the amendments included in the request in question.

For instance, the fourth auxiliary request made it possible to perform comparisons for measuring the impact of content variations, while the fifth auxiliary request allowed conversion actions to be compared between test groups. The sixth auxiliary request specifically helped track conversion actions across repeated visits. The seventh auxiliary request provided for tracking conversion actions across repeated visits and test groups, so it contained all the tools needed for measuring the impact.

The auxiliary requests provided further clarifications of how actions were tracked and how the impact of content variations on visitor conversion actions was measured.

- 7.2 The board does not agree that combining the amendments discussed above for the first to third auxiliary requests helps to clarify claim 1 with respect to measuring the impact that content variations have on visitor conversion actions. The seventh auxiliary request combines the amendments made in the first to third auxiliary requests but still does not specify how the measuring is done and what this measuring implies besides tracking actions. Consequently, the board is not convinced that claim 1 according to the seventh auxiliary request or any of the fourth to sixth auxiliary requests overcomes the board's clarity objection against claim 1 of the main request (Article 84 EPC).

#### **Eighth auxiliary request**

8. *Admission into the proceedings - Article 13(2) RPBA 2020*

- 8.1 During the oral proceedings before the board, the appellant filed an eighth auxiliary request. Its admission into the appeal proceedings is to be assessed under Article 13(2) RPBA 2020, according to which any amendment to the appellant's appeal case made after notification of the summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances which have been justified with cogent reasons by the appellant.

8.2 The eighth auxiliary request is intended to overcome the board's clarity objection raised in the communication accompanying the board's summons dated 16 July 2020 (see point 8.1.2). Consequently, the appellant had the opportunity to file the eighth auxiliary request before the oral proceedings with its letter of reply to the summons dated 9 March 2021. However, when replying the appellant submitted detailed arguments aiming to overcome the board's clarity objection (see point 1.1.3 of the reply) but did not file an amended request.

8.3 In the oral proceedings, when the admission of the late-filed eighth auxiliary request into the appeal proceedings was discussed, the appellant argued that it was surprised that the board's clarity objection had also applied to each of its first to seventh auxiliary requests. It had been clear from point 2.1 of the appellant's letter of reply to the board's communication that in the appellant's view the various auxiliary requests resolved all clarity objections raised by the board. It was evident that in its communication the board had presented detailed inventive-step objections for each auxiliary request but had not informed the appellant in detail about its clarity objections against claim 1 of the auxiliary requests. Consequently, the appellant had been surprised by the board's clarity objections against the auxiliary requests in the oral proceedings and the eighth auxiliary request should be admitted.

8.3.1 Contrary to the appellant's view, the board does not believe that the appellant could have been surprised during the oral proceedings by the fact that the board's clarity objection against claim 1 of the main request also applied to claim 1 of each of the first to



seventh auxiliary requests since the board's communication dated 16 July 2020 stated in point 6: "*[...] unless stated otherwise, raised objections apply, mutatis mutandis, also to the further claims (and lower-ranking claim requests) provided that they contain the same or similar features*". This stated clearly that the clarity objection raised by the board in its communication regarding claim 1 of the main request did actually apply to corresponding features of claim 1 of each of the first to seventh auxiliary requests unless stated otherwise.

In the oral proceedings the board also argued that the appellant had consistently contended that the first to seventh auxiliary requests (see its letter of reply dated 9 March 2021, points 2.2.1 to 2.2.7) clarified how the impact of the modifications was tracked or how the objection concerning "measuring the impact" was overcome. In view of this, the board considers that the appellant understood that the clarity objection raised in point 8.1.2 of the board's communication also applied to claim 1 of each of the first to seventh auxiliary requests.

For the third auxiliary request, the board mentioned in its communication that the limitation to tracking conversion actions improved the clarity of claim 1. The board considers that it was clear that this improvement related to its clarity objection concerning the words "non-conversions" and "non-responses", which were omitted by the third auxiliary request. There is no reason why the board's statement could have been construed as meaning that the third auxiliary request also overcame the board's clarity objection raised in point 8.1.2 of its communication.

In view of the above, the board is not convinced by the appellant's argument that it was surprised by the board's clarity objection against the auxiliary requests.

- 8.4 Since the board does not see any exceptional circumstances justifying the late amendment to the appellant's appeal case through the filing of the eighth auxiliary request during the oral proceedings, it does not admit the eighth auxiliary request into the appeal proceedings (Article 13(2) RPBA 2020).

### **Conclusion**

9. Since none of the requests admitted into the appeal proceedings is allowable, the appeal is to be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chair:



S. Lichtenvort

M. Jaedicke

Decision electronically authenticated